PUBLIC PROSECUTOR

v.

NORDIN BIN YUSMADI

HIGH COURT MALAYA, KUALA LUMPUR
DATO' K.C. VOHRAH J
[CRIMINAL SUIT NO. 42-11-94]
6 FEBRUARY 1996

CRIMINAL LAW: *Rape - Youthful offender - Whether to be necessarily treated with leniency - Custodial sentence - Whether mandatory - Penal Code ss. 375,376.*

CRIMINAL PROCEDURE: *Sentencing - Rape - Youthful offender - Offender 19 years of age - Whether could be admitted to corrective school - Whether Court bound to impose sentence of imprisonment - Phrase* ***"shall be punished with imprisonment"*** *- Section 376 Penal Code - Whether mandatory in nature - Additional punishment of whipping - Whether only discretionary - Penal Code ss.* 375, 376 - *Juvenile Courts Act 1947 s. 40.*

WORDS & PHRASES: *"Shall be punished with imprisonment" - "Shall be liable to whipping" - Penal Code ss. 193 & 376.*

Before the Sessions Court, upon his own guilty plea, the respondent was convicted of a charge of rape under s. 375 of the Penal Code. The facts showed that on the night in question the respondent had participated in a group to rape the victim, and the respondent was the seventh to have had sex with her. At the material time the respondent was 19 years of age, while the victim was aged 15 years and 11 months.

Section 376 Penal Code stipulates that "*whoever commits rape* ***shall be punished with imprisonment*** *for a term not less than five years and not more than twenty years, and shall also be liable to whipping"*. This provision notwithstanding, the learned Sessions Judge, somehow, declined to invoke the section. Instead, acting apparently under the additional power made available to the Sessions Court by the second limb of s. 40 of the Juvenile Courts Act 1947 (the Act), she made an order that the respondent be detained at a Henry Gurney School, although the respondent was not a "juvenile" within the meaning of the Act. It was evident that in opting for the order, the Sessions Judge relied upon the fact that the respondent was a youthful offender, and had pleaded guilty to the charge. The Sessions Judge was also of the view that upon seeing the others having sex with the victim, because of his youth, it was not unusual for the respondent to have been aroused. In this appeal by the Public Prosecutor the primary question that arose was whether, bearing in mind the peremptory language of s. 376, it was wrong of the Sessions Judge not to have imposed the prescribed sentence of imprisonment on the respondent.

Held:

[1] There can be no doubt that a term of imprisonment had to be imposed by the Judge on the respondent. The meaning of the words ***"shall be punished with imprisonment"*** in s.376 is clear and they connote that a term of imprisonment has to be mandatorily imposed. In the circumstances, upon the respondent's conviction, it was imperative that the Sessions Judge impose a sentence of imprisonment, the term which shall not be less than five years. The punishment of whipping is however discretionary.

[2] Rape, being a serious offence, cannot be treated lightly. The respondent, being 19 years old, should have sufficient intelligence to know right from wrong. Further, in raping the innocent girl, the respondent had participated in a group and that makes the offence all the more serious. However, in weighing and apportioning a mandatory term of imprisonment, the Court has to take into account his relative youth, the time spent in the Henry Gurney School and the fact that he has pleaded guilty. The order of the Court below is set aside and substituted with a sentence of 5 years imprisonment.

[Appeal allowed. Order accordingly]

Cases referred to:
Public Prosecutor v. Agambaran s/o Kanee (Federal Court Criminal Application No. 9 of 1994) ***(foll)***
Public Prosecutor v. Man bin Ismail [1939] MLJ Rep 161 at 163 ***(refd)***
Public Prosecutor v. Leonard Glenn Francis [1989] 2 MLJ 158 ***(foll)***
Public Prosecutor v. Yap Huat Seng [1985] 415 at 416 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 66
Criminal Procedure Code, s. 294
Juvenile Courts Act 1947, s. 40
Penal Code, ss. 193, 375, 376
Vagrants and Decrepit Persons Enactment, s. 3(a)

For the Public Prosecutor - Khadijah bt. Mahmud; Deputy Public Prosecutor
For the respondent - In person

JUDGMENT

K.C. Vohrah J:

This is a case involving the rape of a girl below 16 years of age (she was 15 years 11 months) at the time of the offence and whether she gave consent for the sexual intercourse is irrelevant having regard to the sixth description under s. 375 of the Penal Code. The facts disclosed by the prosecution and admitted to by the respondent show, however, that she was forced to have sexual intercourse with him. The Judge of the Sessions Court convicted the

respondent on his plea of guilt on the offence of rape under s 376 and she ordered him to be detained at a Henry Gurney School.

The learned Judge did not indicate the provision of law she was acting under when she ordered the detention. The respondent was 19 years old when he committed the offence and it would appear that the Judge must have felt that she could exercise the additional power made available to the Sessions Court under the second limb of s. 40 of the Juvenile Courts Act 1947 (Revised Courts Act 1947 (Revised - Act 90) although the respondent was not a "Juvenile" within the meaning of the said Act.

It is not clear whether the additional power under the second limb of s. 40 is only available where the person before the Court was a "juvenile" when the offence was committed but that does not arise to be decided upon in these proceedings as it is not relevant having regard to the clear terms of s 376 of the Penal Code which indicate that a mandatory term of imprisonment of between 5 to 20 years has to be meted on an offender who has committed rape and the fact that the Judge of the Sessions Court had convicted him on the offence.

Section 376 of the Penal Code reads -

> 376. Whoever commits rape shall be punished with imprisonment for a term not less than five years and not more than twenty years, and shall also be liable to whipping.

It will be noted the offender "shall be punished with imprisonment". On 23 July 1984 the Federal Court had occasion to construe the words "shall be punished with imprisonment" appearing in s. 193 of the Penal Code.

The Federal Court in that case, on a reference under the then s. 66 of the Courts of Judicature Act 1964, gave an answer that it is mandatory in law to impose a sentence of imprisonment. For ease of reference the whole order of the Federal Court is reproduced below:

THE FEDERAL COURT OF MALAYSIA

HOLDEN AT IPOH

(Appellate Jurisdiction)

FEDERAL COURT CRIMINAL APPLICATION
NO: 9 OF 1984
Penang High Court Criminal
Appeal No. 73 of 1983

Between

Public Prosecutor ... Applicant

And

Agambaran s/o Kanee ... Respondent

CORAM: THE HONOURABLE TAN SRI DATO' ABDUL HAMID BIN HJ. OMAR, CHIEF JUSTICE MALAYA;

THE HONOURABLE TAN SRI DATUK HASHIM BIN YEOP ABDULLAH SANI, JUDGE, FEDERAL COURT MALAYSIA

THE HONOURABLE TAN SRI DATO' E.ABDOOLCADER, JUDGE, FEDERAL COURT, MALAYSIA

IN OPEN COURT
THIS 23RD DAY OF JULY 1984

ORDER

UPON MOTION made unto Court this day by Mr. Fong Seng Yee, Deputy Public Prosecutor, for and on behalf of the Applicant and in the presence of Mr. S. Anthonysamy of Counsel for the Respondent AND UPON READING the Notice of Motion dated the 19 June 1984, the Affidavit of Fong Seng Yee affirmed on the 8 June 1984 and the certificate of the Public Prosecutor under s. 66(l) of the Courts of Judicature Act, 1964 dated the 8 June 1984 and all filed herein AND UPON HEARING the Deputy Public Prosecutor and Counsel as aforesaid IT IS ORDERED that this Application for leave to refer questions of law of public interest under s. 66 of the Courts of Judicature Act, 1964 namely:

(a) Whether on a proper construction of the words "shall be punished with imprisonment" appearing in s. 193 of the Penal Code it is mandatory in law for the Court to impose a sentence of imprisonment.

(b) If the answer to question (a) is in the affirmative, then is it wrong in law for the learned Judge not to impose a sentence of imprisonment on the accused

who was found guilty and convicted for an offence under s. 193 of the Penal Code.

be and is hereby allowed AND IT IS LASTLY ORDERED that the answer to the questions above be in the affirmative.

GIVEN under my hand and the seal of the Court this 23 July 1984.

Soo Ai Lin
SENIOR ASSISTANT REGISTRAR
SUPREME COURT MALAYSIA

Although no written grounds were given for the Judgment it does appear that the Federal Court rested its decision obviously on the clear meaning of words "shall be punished with imprisonment"; that they connote that a term of imprisonment has to be mandatorily imposed. In this connection it is apposite to set out what Atkin J had to say in *PP v. Man bin Ismail* [1939] MLJ Rep 161 at 163 where the phrase "shall be liable to imprisonment to 6 months" appearing in s. 3(a) of the Vagrants and Decrepit Persons Enactment had to be construed. Atkin J said that the phrase gives the Court an absolute discretion as to whether it shall award a sentence of imprisonment or deal with the accused in the case under and in accordance with the probationary provisions of s. 294 of the Criminal Procedure Code. He added, however, as regards the phrase "shall be punished with imprisonment":

> If the legislature had intended that all persons convicted of an offence against this s. 3(a) of the Vagrants and Decrepit Persons Enactment should be sent to prison whatever the circumstances may be, it would have used the expression "shall be punished with imprisonment", which is to be found so frequently in our Penal Code.

In *PP v. Leonard Glenn Francis* [1989] 2 MLJ 158 the President of the Sessions Court had ordered the accused, after convicting him, to be bound over in the sum of RM10,000 with two sureties for five years under s. 294 of the CPC after he was found guilty of an offence under s. 8 of the Firearms (Increased Penalties) Act 1971. The section provided that the offender "shall be punished with imprisonment for a term which may extend to fourteen years and with whipping with no less than six strokes". Edgar Joseph Jr. J (as he then was) said at 161:

> With respect, in my view the learned president was clearly in error. Once a conviction is recorded in respect of an offence under s. 8 of the Firearms (Increased Penalties) Act 1971, the provisions of s. 294 of the Criminal Procedure Code are overriden and the Court must proceed to impose a sentence of imprisonment and whipping with not less than 6 strokes.

In the present case there can be no doubt that a term of imprisonment had to be imposed by the Judge on the respondent who was found guilty and convicted on the charge of rape. The minimum term of imprisonment shall be not less than five years and that is clear from the peremptory language used in s. 376. The punishment of whipping is however discretionary.

The respondent was the seventh to have had forcible sex with the victim that night. The learned Judge of the Sessions Court commented that because of his youth at the time of the commission of the offence the respondent must have surely been aroused when he saw the others having sex with her. With respect to the Judge, the respondent was 19 years old then and surely must be credited with some intelligence to know right from wrong; and he had forcible sex with the young girl. Rape is a serious offence reflected in that Parliament has imposed a minimum of 5 years imprisonment for the offence. It cannot be treated lightly. It will be a sad day when persons found guilty of rape can plead that they were young when they committed the offence and ask for lenient sentences and then be dealt with leniently. The probation report on which the learned President relied also refers to the fact that the respondent is young and a first offender but to this the words of Shaik Daud J (as he then was) in *PP v. Yap Huat Seng* [1995] 415 at 416 are relevant:

> The respondent or any other offender may be a first offender and young but those factors alone do not entitle him to be treated with leniency. To my mind the need to deter others in the public interest must supersede other considerations. As is well known rape cases are very difficult to prove and rape victims especially young victims, go through traumatic experience at the time of the offence and later, and also at the trial more often than not they become the accused rather than the accuser. In view of this, to my mind, once such offence is proved the Courts must and should take very serious view and impose appropriate deterrent sentences. The public would lose confidence in the Courts if lenient sentences are meted out for such offences.

The offence committed was all the more serious because the respondent had participated in a group like a pack of animals to rape the poor innocent girl. But in weighing and apportioning a mandatory term of imprisonment between five to ten years I had to and did take into account his relative youth, the time spent in a Henry Gurney School and the fact that he pleaded guilty to the charge.

I set aside the order of the Judge of the Sessions Court sending him to a Henry Gurney School and substituted a sentence of 5 years imprisonment.